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IN THE

Supreme Court of the United States

October Term, 1958

No. 739

ROBERT G. THOMPSON,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York denying petitioner's motion under 28 U. S. C. Section 2255 and Rule 35 of Federal Rules of Criminal Procedure to vacate and set aside his conviction and sentence of four years imprisonment for criminal contempt.

Opinions Below

The opinion of the Court of Appeals on the motion under 28 U. S. C. Sec. 2255 appears at 261 F. 2d 809. A copy of said opinion is appended hereto. The opinion of the District Court on the motion is unreported. A copy of said opinion is contained in the appendix record in the Court of Appeals at pages 16a-17a. The opinion of the District Court on the criminal contempt conviction appears at 117 F. Supp. 685. A copy of said opinion is contained

in the appendix record in the Court of Appeals at pages 3a-14a. The opinion of the Court of Appeals affirming the conviction appears at 214 F. 2d 545.

Jurisdiction

The judgment of the Court of Appeals was rendered and entered on December 2, 1958. Jurisdiction of this Court is conferred by 28 U. S. C. 1254.

Questions Presented for Review

1. Whether petitioner's conviction rests upon an erroneous and unconstitutional construction of 18 U. S. C. Sec. 401 (3)?

2. Whether on the record in this case petitioner was convicted on a charge not made in violation of his constitutional right to procedural due process?

3. Whether the trial court was without jurisdiction to impose sentence for the reason that petitioner was convicted for an offense not cognizable under our laws?

4. Whether petitioner was convicted on a record so utterly barren of proof as to render the judgment arbitrary and void?

5. Whether petitioner was punished a second time for the same offense in violation of his constitutional right not to be placed in double jeopardy?

6. Whether the court below violated petitioner's constitutional right to be confronted with the evidence and an opportunity to rebut it by taking judicial notice *de hors* the record of a material fact?

7. Whether front page news appearing for one day in the daily press is the proper subject of judicial notice in a criminal case?

8. Whether in a criminal case requiring proof of actual knowledge, a court may impute to a defendant knowledge of front page news appearing in two newspapers in the absence of evidence tending to show that the papers were brought to the attention of the defendant?

9. Whether the rule as to the standards of proof in civil proceedings is applicable in a summary proceeding for criminal contempt?

10. Whether, under the circumstances in this case, the remedy of collateral attack on the conviction and sentence under 28 U. S. C. Section 2255 is available to petitioner?

Statutes Involved

18 U. S. C. Sec. 401; June 25, 1958, c. 645, 62 Stat. 701:

> "Power of Court. A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and no other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command."

28 U. S. C. Sec. 2255; June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, Sec. 114, 63 Stat. 105:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws

of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

Statement of the Case

1. The criminal contempt proceedings.

The petitioner was one of the defendants whose conviction of conspiracy to violate the Smith Act, 18 U. S. C. Sec. 2385, was affirmed by this Court in *Dennis* v. *United States*, 341 U. S. 494, on June 4, 1951. Petitioner and his co-defendants were then at large on bail (Govt. Ex. 3). On July 2, 1951, an order on mandate, containing a provision directing the *Dennis* defendants to surrender on that day, was signed by Hon. Sylvester J. Ryan, District Judge for the Southern District of New York. Petitioner and three of his co-defendants in *Dennis*, namely, Gilbert Green, Henry Winston and Gus Hall did not surrender (Tr. 36).*

* Tr. refers to the record from the court below. The record has not been printed.

Petitioner was apprehended on August 27, 1953, in California (Tr. 69-70). Contempt proceedings were initiated by an order to show cause which charged petitioner with criminal contempt of court under 18 U. S. C. Sec. 401(3) "by reason of the fact that he *knowingly* and deliberately disobeyed and resisted a lawful order and command of this Court directing him to appear before it on July 2, 1951 and July 3, 1951 requiring him to surrender himself in execution of the judgment and sentence" previously imposed upon him for violation of the Smith Act (Tr. 205). The affidavit submitted by the United States Attorney in support of the order to show cause alleges petitioner "well knew of the *outstanding* order and decree of this Court" (Tr. 208).

A trial without a jury, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, was held before Hon. Gregory F. Noonan, District Judge for the Southern District of New York who found petitioner guilty in an opinion filed December 15, 1953. *United States v. Thompson*, 117 F. Supp. 685 (App. 3a-14a).* Petitioner was sentenced to serve a term of four years on the contempt charge, to run consecutively to his three year sentence on the Smith Act conviction (Tr. 272).

The evidence

At the trial the following evidence was adduced:** On June 13, 1951, ten days after the affirmance of his conviction, petitioner, who resided at that time in Long Island City, registered at a hotel in midtown Manhattan (Tr. 46, Govt. Ex. 9). On June 22, 1951 an application made on be-

* App. refers to the appendix record in the Court of Appeals.

** We beg this Court's indulgence for the extended discussion of the evidence which follows. We have set forth this discussion here because we believe that its full presentation at this point is essential to a clear understanding of the issues involved.

half of all of the *Dennis* defendants to stay the mandate and to continue bail was denied by the late Mr. Justice Jackson (Govt. Ex. 2). On June 28, 1951, before the mandate of this Court came down to the District Court, the United States Attorney served Mr. Sacher, counsel for certain of the *Dennis* defendants, with a proposed order on mandate containing a notice that it would be submitted to the district court on July 2, 1951. The proposed order contained a provision requiring the *Dennis* defendants to surrender for commitment on that date (Govt. Ex. 6). On June 29, one day after service of the proposed order, Mr. Sacher appeared before Judge Ryan in support of orders to show cause concerning the sentences previously imposed on the *Dennis* defendants (Tr. 27-9). Judge Ryan continued the matter for July 2, 1951 since the mandate of this Court had not yet come down to the District Court. At that time Mr. Sacher stated to Judge Ryan "you have my word that all these defendants will be here at that time" [July 2, 1951] (Tr. 29). Petitioner and three of his co-defendants, Green, Winston and Hall did not appear in court on July 2. The proposed order on mandate containing the surrender provision was signed by Judge Ryan after the absence of the four was noted (Tr. 36). On July 3 Judge Ryan questioned Mr. Sacher concerning the last time he had seen the missing four (Tr. 31). Mr. Sacher stated he last saw Green, Winston and Hall on June 29, at Communist Party headquarters some time after he left the courthouse and that he told them to be present in Court on July 2 (Tr. 31-3). As to petitioner Thompson Mr. Sacher stated: "*I didn't see Thompson on Friday* [i.e. June 29, 1951] *that is my best recollection that I didn't see him. I may have*" (Tr. 33). Judge Ryan also interrogated Abner Green one of the sureties for the *Dennis* defendants. Mr. Green stated that he saw petitioner and his co-defendant Gilbert Green in the hallway of the Communist Party headquarters on June 29 at about 4 or 4:30 p.m. (Tr. 122, 124-5).

The record further shows that appellant Thompson was last seen leaving the hotel on July 1, 1951, one day before the proposed order was signed (Tr. 60-2).*

At the time of his apprehension, Thompson was some forty pounds heavier than when he was last seen in New York, he had grown a mustache and his hair, mustache and eyebrows had been dyed red (Tr. 43, 72-3, Govt. Exs. 15-8 incl.). There was some evidence that three weeks prior to his apprehension he used the assumed name of John Francis Brennan in obtaining a fishing permit (Tr. 103-5) and at the time of his apprehension he had in his possession identification documents bearing that assumed name (Tr. 84-93, Govt. Exs. 20-33 incl.) The records of the Bureau of Motor Vehicles of New York showed that on July 31, 1951 a driver's test was given in Queens to one, John Francis Brennan. The descriptive data appearing on the application corresponded in general with the description of petitioner prior to the time when he was last seen (Govt. Ex. 38).

The District Court found that the evidence established petitioner's knowing disobedience of the order beyond a reasonable doubt (App. 13a). In so doing it followed the decision in *United States v. Hall*, 198 F. 2d 726 (C. A. 2), in which the majority of the Court of Appeals sustained the conviction for contempt of Hall, another absconding *Dennis* defendant. In that case, the court relied on evidence that Hall was notified by counsel on June 29 to appear in court on July 2 and found that this constituted constructive notice to Hall of the order thereafter entered on July 2 requiring him to surrender for commitment.**

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* Petitioner left his personal belongings at the hotel, did not check out and never returned to the hotel (Tr. 47-8).

** Thus, after finding that Hall had notice of the order of July 2 and wilfully disobeyed it, the opinion states (at 730, note 7): "That this was a notice to appear for the order of commitment, rather than the order itself, raises no question; the notice, too, formed part of the court's command."

Unlike the record in *Hall*, there was no evidence here that counsel had informed petitioner at any time to be present in court on July 2. Here, there was no evidence whatever from which the trial judge could have inferred petitioner's knowledge of the proposed order. All that the record shows is that petitioner jumped bail and fled from impending imprisonment. The evidence points to that conduct and no other. Reprehensible as that conduct was, it did not, at that time, constitute a punishable offense.* To convert that conduct into a punishable offense under the contempt statute proof of knowledge of the existence of the surrender order is essential. Proof of such knowledge, constructive or actual is wholly absent here. The trial judge supplied this deficiency in proof by a series of inferences which have no basis in the evidence and which rest upon pure speculation. Thus, the trial judge rested the conviction upon a theory of constructive knowledge and upon evidence which fails to establish even such knowledge.

The trial judge made the following specific findings on the question of knowledge:

(1) Thompson should have known that he "would be required to surrender" or he was on notice that after the affirmance of his conviction the District Court "would direct him to surrender." The judge said (App. 10a-11a):

> "It certainly was apparent to all of the defendants in the *Dennis* case, including Thompson, that following the affirmance of their conviction under the Smith Act by the Supreme Court on June 4, 1951, *they would be required to surrender as* soon as the mandate was filed in the District Court. If this is not so, why was a stay of mandate applied for on June 22, 1951? Upon the filing of the mandate, Judge Ryan entered the usual order on July 2, 1951. Certainly *Thompson was on notice that on the affirmance of his*

* Bail jumping did not become a separate crime until three years after petitioner's flight and a year after his apprehension. 18 U. S. C. Sec. 3146.

> *conviction*, the District Court would 'direct' him to surrender, inasmuch as the bail bond which he signed on November 3, 1949 contained a provision that Thompson would 'surrender himself in execution of the judgment * * * on such day * * * as the District Court of the United States for the Southern District of New York may direct.' (Emphasis supplied.)

The events on which the trial judge here relies occurred long before the order was made and even before the proposed order was served on Mr. Sacher. Hence it amounts to no more than petitioner should have known that at some time or other following the affirmance of his conviction he would be required to surrender. This is totally different from a finding that petitioner had knowledge that a specific order *had been made* directing his surrender on July 2.

(2) Thompson had notice or knowledge of the prospective issuance of the order which he received from Mr. Sacher sometime prior to or after Mr. Sacher's appearance in court on June 29. With respect to his finding that petitioner was informed of the existence of the proposed order on June 29 after Mr. Sacher's appearance before Judge Ryan, the trial judge reasoned as follows: Mr. Sacher went to Communist Party headquarters on June 29, some time after his appearance in court and saw Hall, Winston and Green; one of the sureties saw Thompson and Green in the hallway of the Party headquarters on June 29 at about 4 or 4:30; Mr. Sacher must have seen Thompson at the same time that he saw the others and hence must have notified him to be present in court on July 2 (App. 12a-13a). But this inference is supportable only if the record shows that Thompson was at Party Headquarters *at the same time* Mr. Sacher was there. However, the time of Mr. Sacher's presence at Party Headquarters is unfixed except for the vague sometime "after" his appearance in court on June 29. Hence to fix the time when he was there as of 4 or

4:30 p. m. when Thompson was seen at Party headquarters is pure conjecture.*

Recognizing the weakness of this inference Judge Noonan buttressed his finding with the alternative finding that Mr. Sacher informed Thompson of the proposed order sometime prior to his appearance on June 29 before Judge Ryan. Here too the Judge indulged in pure conjecture. He reasoned (App. 11a-12a):

> "on June 29th when Mr. Sacher appeared before Judge Ryan, he assured the court that all of the defendants in the *Dennis* case would be present in court on Monday, July 2, 1951, and when asked about the basis for his assurance to this effect, Mr. Sacher replied:
>
> 'the only basis on which I could make my statement or promise to the court was the promise of my clients and the others to appear.'

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* The court appears to rely upon the fact that Thompson was seen at Party headquarters at the same time when his co-defendant Green was seen there. The court reasoned: Mr. Sacher saw Green; hence, Mr. Sacher saw Thompson. But the mere fact that petitioner's co-defendant Green, was seen by the surety in the hallway of Party Headquarters at about 4 or 4:30 p. m. on June 29, at the same time that petitioner was seen by the surety sheds no further light on the question. For all this does is to fix the time when Thompson and his co-defendants were seen by the surety. It has no tendency to establish that Thompson was present when his co-defendants were seen by Mr. Sacher. Thompson might have been in the building only at the time when he was seen by the surety. He might have just arrived or been on his way out at the time. Green might have been in the building the entire day. The probability of the time and the duration of their presence in the building is as varied as the number of hours of the day. Indeed, the Government, in its brief before this Court in *Green and Winston* v. *United States*, 356 U. S. 165, concedes that on June 29, following the proceedings before Judge Ryan, "Mr. Sacher went to Communist Party headquarters * * * where he consulted with all of the *Dennis* defendants, *with the possible exception of one (Thompson.")*. (Emphasis added.) We respectfully suggest that in a criminal case where proof of guilt beyond a reasonable doubt is required it is unconscionable for the Goverment to rely upon proof, which it concedes in another case was possibly absent.

> From this it seems perfectly plain that Mr. Sacher made his assurance to the court that he did because he had been in communication with all of the defendants including, specifically, the respondent, Thompson."

But Judge Noonan relied on only a partial extract from Mr. Sacher's statement to Judge Ryan. The full statement appears as follows (Tr. 34):

> "The Court realizes, of course that the only basis on which I could make my statement or promise to the Court was the promise of my clients and the others to appear. I don't seek refuge here [in] the fact that I was attorney only for three, for the fact is that many more than three spoke to me this past week and that all said they would appear."

The conclusion drawn by Judge Noonan from this evidence is based on the following assumptions: 1) that petitioner was among the many more than three who spoke to Mr. Sacher during the week ending June 29; and 2) that the conversation was concerned with the proposed order which was served on Mr. Sacher on June 28. But these assumptions find no support in the record. Mr. Sacher's statement does not establish that Thompson was among those who spoke to him "this past week". For it will be observed that Mr. Sacher did not say he had spoken to all the defendants. He said only that he had spoken to "many more than [the] three" whom he represented,* and that those to whom he had spoken had "all said they would be here". Nor is there anything in the record to support the assumption that the conversation was concerned with the proposed surrender order. The order was not a common one and hence could not have been anticipated even by

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* The record shows that appellant was not represented by Mr. Sacher (Tr. 221).

counsel.* The first inkling that such an order would be applied for appeared for the first time on June 28. For until service of the proposed order no one could have acquired knowledge that a specific order directing surrender would be made.

Hence, an inference that the proposed order was the subject of the conversations must be supported at the very least by evidence that it occurred after its service on Mr. Sacher on June 28. There is no such evidence. The evidence places the conversation as having occurred "this past week", which commenced on Monday, June 25. Thus, to the speculative inference drawn by the judge that petitioner was among those to whom Mr. Sacher spoke, the trial judge added the further speculative inference that the conversation occurred after service of the proposed order. From this it drew its final inference that Mr. Sacher discussed the proposed order with petitioner. The mere fact that Mr. Sacher obtained the promise of "many" to appear lends no further support to the inference that the conversation referred to by Mr. Sacher was related to the proposed order. For the necessity of surrendering for imprisonment as soon as the mandate of this Court came down was obvious long before the proposed order was served on Mr. Sacher and discussion of this necessity did not at all turn upon knowledge of an uncommon order directing surrender.**

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* The trial court conceded that a specific order requiring defendant to surrender following affirmance of his conviction "may be uncommon" (Tr. 158). In the *Hall* case the respondent asserted and neither Judge Ryan nor Government counsel denied that it was an unusual thing in the Southern District for an order to be made after affirmance of a conviction requiring a defendant to surrender. Hence, Judge Biggs, without contradiction from the majority said in *Hall* (at 731): "The proposed order contained the following unusual provision: '* * * and it is further ordered, adjudged and decreed that the defendants personally surrender to the United States Marshal'."

** Indeed, as the trial court found, petitioner began preparations for flight on June 13, when he registered at the midtown Manhattan hotel, long before the proposed order was served on Mr. Sacher (App. 11a).

Even assuming the validity of all of the inferences drawn by the trial judge with respect to the evidence discussed above, the finding that "Thompson was notified of the surrender order *before* Mr. Sacher appeared in the courthouse on June 29" or that "Thompson was notified of the order in question" on June 29, amounts to no more than that petitioner was notified that an order to surrender *would be applied for* or *might be made* on July 2. Thompson could know no more than this on June 29, three days before the order was actually made.

The only other evidence which the trial judge considered was evidence of flight and disguise. But he did not, as indeed he could not, treat such evidence as evidence of knowledge. He plainly treated such evidence solely as evidence of wilfullness and this only *if* the record *otherwise* showed evidence of knowledge. The trial judge said (App. 19a):

> "It cannot be disputed that if Thompson had notice or knowledge of the surrender order, he wilfully failed to obey it. The undisputed evidence as to his disguise, his adoption of the identity of a dead man, his flight across the country, the varied addresses, all false, which he gave, points conclusively to a conscious and wilfull attempt to avoid jail. *The only question is whether or not Thompson knew of the surrender order. If he knew of the surrender order and wilfully flouted it, he is guilty of the charge of contempt here made against him.*" (Emphasis supplied.)

After finding that petitioner had knowledge of the *proposed order*, the trial judge then found that petitioner's flight was from the order directing his surrender. He said (App. 13a):

> "Thompson's flight when added to the notice he received at Communist Party headquarters, indicate he became a fugitive from the surrender order.
>
> "It is, of course, well-settled that evidence of flight is ordinarily 'of slight value and of none whatsoever

unless there are facts pointing to the motive which prompted it.' *People* v. *Fiorentino*, 197 N. Y. 560, 567, 91 N. E. 195, 198. But here, significantly, it was not until the order was entered that Thompson falsified his identity and effected his disguise. It was not until after the order was made that he left the jurisdiction of this court. We would be blindly resistant to realities if we were to ignore the fact that Thompson had remained in New York over one and one-half years while on Bail, and yet departed within twenty-four hours of the order of surrender. This was certainly no coincidence."

As is evident from the first sentence quoted above, the structure of the trial judge's reasoning here presupposes petitioner's knowledge of the *proposed order*. Indeed the trial judge fixes the time of flight as one day before the order was made.* As we have shown herein, there is no support in the record for a finding of petitioner's knowledge of the proposed order. Moreover in the absence of evidence that petitioner knew that the order *had been made*

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* On the record here, this is the only meaning which can be given to the above quoted finding that petitioner "departed within twenty-four hours of the order of surrender." For the only reference to "within twenty-four hours" of the order which appears in the record is July 1, the day petitioner was last seen leaving his hotel under circumstances which suggest that he then commenced his flight (App. 11a). There is no evidence whatever in the record which could lend support to a finding that petitioner departed within twenty-four hours *after* the order was made. We do not know the basis upon which the trial judge concluded elsewhere in the finding quoted above that petitioner fled the jurisdiction after the order was made. He may have been relyinging upon the records of the Bureau of Motor Vehicles which establish that one, John Francis Brennan (the name assumed by petitioner while in flight), took a driver's test in Queens on July 31, 1951. But he makes no reference to this item of evidence anywhere in his opinion. Certainly it could have no bearing on the finding of petitioner's departure "within twenty-four hours of the order"—a period which can only be explained by the judge's earlier finding that petitioner was last seen on July 1.

it is of course immaterial whether he left the jurisdiction or effected his disguise after the order was made. Petitioner's flight does not in itself tend to establish such knowledge. For on this record, petitioner's flight is referable only to a conscious and willful attempt to avoid imprisonment. It was not the order which gave rise to the threat of imprisonment. Imprisonment was inevitable even though an order directing surrender was never made.* Indeed the evidence shows and the trial judge found that *petitioner began his preparations for flight more than two weeks before the proposed order for his surrender was served on Mr. Sacher* (App. 11a). Under these circumstances, how can it rationally be said that petitioner fled from an order, of which he was not shown to have had any knowledge, rather than from an arrest which he knew would have to come in the wake of his conviction. It must not be overlooked that, unlike the ordinary criminal case where flight is some evidence of consciousness of guilt, the offense here is composed of the act of flight plus knowledge of the order. As in all cases where the conduct becomes criminal only if accompanied by a specific mental state, proof of that mental state must be estab-

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* Mr. Justice Brennan, in *Green and Winston* v. *United States*, 356 U. S. 165 (dissenting) observed of the precise order in question (at 223-224):

> "The Court's opinion gives the impression that the surrender order was an order in familiar and customary use, well known to the sophisticated in the criminal law. I doubt that even widely experienced criminal lawyers encounter this provision very often. The provision was not the occasion for the entry of the order of July 2. The purpose of that order, as its caption 'Order on Mandate' shows, was to enter an order in the District Court to give effect to the Mandate of this Court affirming the convictions of the Dennis defendants. But for the necessity of entering an order for that purpose there may well have been no surrender order. No statute or rule of court, even a local rule of the District Court, can be pointed to as requiring inclusion of the surrender provision. The bondsman who stands to lose the posted bail, not a surrender order, is usually counted on to produce the defendant."

lished wholly apart from the conduct itself. And if the evidence of the conduct is as consistent with an innocent state of mind as with a guilty state of mind the conviction cannot be sustained. *American Communications Association* v. *Douds*, 339 U. S. 382, 412 note 21. Cf. *Grunewald* v. *United States*, 353 U. S. 391, 401-404, where this Court declined to find support for a finding of an actual agreement to conceal the conspiracy from circumstantial evidence of overt acts of concealment since the circumstances relied on were referable to every conspiracy. See also *Miller* v. *United States*, 357 U. S. 301, 310-313, where this Court declined to infer petitioner's knowledge from an ambiguous act because such proof was lacking in "virtual certainty."

The sentence

The trial judge sentenced petitioner to serve a term of four years on the contempt charge, to run consecutively to the three year sentence on the Smith Act conviction (Tr. 272).

After the trial judge imposed sentence counsel for the petitioner voiced objection to its severity, and moved for reconsideration. In explaining the severity of the sentence the trial judge indicated an intention to equalize the disparity between the three year sentence received by petitioner on the Smith Act conviction with that of the five year sentence imposed on his co-defendants. He said (Tr. 200):

> "I thought at first of imposing a sentence *which would require him to serve the same sentence as the sentence of every other defendant in the Dennis case, particularly Mr. Gus Hall*, but again, I have taken into consideration the fact that he has a good war record." (Emphasis added.)

The trial judge applied as the yardstick the combined total of the five year sentence imposed on Hall on the Smith Act and the three years on the contempt convictions.

Hence, taking into account petitioner's war record, the judge imposed a sentence which resulted in a combined total of seven years (Tr. 197-201). Although the trial judge in the course of the colloquy which followed stated that he did not increase petitioner's sentence on the Smith Act conviction (Tr. 200-1), we respectfully submit that the record indicates that this was the plain effect of the factors considered by him in imposing sentence.*

Petitioner appealed from the conviction contending: 1) the evidence was insufficient to establish knowledge of the existence of the order which he was charged with having disobeyed; and 2) the trial judge, in fixing petitioner's sentenec at four years was guided by standards that were irrelevant, unfair and improper and that the punishment was arbitrary and excessive. The conviction was affirmed on the authority of *Hall* (*United States* v. *Thompson*, 214 F. 2d 545) and certiorari was denied (*Thompson* v. *United States*, 348 U. S. 841). In his petition for certiorari petitioner raised the questions set forth above and in addition he also raised the question of the power of the court to punish him for criminal contempt for disobeying an order directing him to surrender.**

2. The proceedings under Title 28 U. S. C. Section 2255.

In February and March of 1956 Green and Winston, the remaining two absconding *Dennis* defendants, surrendered voluntarily and were similarly charged with contempt and

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* At the time the trial judge imposed sentence on the contempt conviction petitioner was serving his sentence on the Smith Act conviction.

** The question of the power of the court to punish for criminal contempt disobedience of an order of surrender was raised in *Hall* and decided adversely to him by the Court of Appeals. *United States* v. *Hall*, 198 F. 2d 726, cert. den. 345 U. S. 905. Since this question was decided adversely to Hall, Thompson did not argue the question in his appeal to the Court of Appeals but preserved it for presentation to this Court.

convicted. The convictions were affirmed by the Court of Appeals *U. S.* v. *Green and U. S.* v. *Winston*, 241 F. 2d 631 (C. A. 2). On May 27, 1957 this Court granted certiorari. *Green and Winston* v. *United States*, 353 U. S. 972.

On June 4, 1957, petitioner filed a motion in the District Court for the Southern District of New York, under 28 U. S. C. Sec. 2255, to vacate and set aside his sentence for contempt on the grounds that said sentence was imposed in violation of the Constitution and the laws of the United States, that the court was without jurisdiction to impose such sentence and that such sentence was in excess of the maximum authorized by law (Tr, 288).* In support of this contention petitioner urged 1) that the court was without power to punish as for a contempt disobedience of an order directing his surrender for sentence under a prior conviction and 2) that the court was without power to impose a sentence in excess of one year of imprisonment for such contempt (Tr. 290). The identical issues raised by petitioner were among the issues pending before this Court in *Green and Winston* (Tr. 290-1). In addition to questions concerning the contempt power of the court, Green and Winston contended that the evidence was insufficient to support their convictions in that they were based upon mere proof of knowledge of the prospective issuance of the order.

Arguument on the motion was heard before the Hon. Edmund L. Palmieri, District Judge for the Southern District of New York on June 10, 1957 and Judge Palmieri reserved decision (Tr. 362).

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*At the time petitioner filed his motion he had completed his three year Smith Act sentence and approximately nineteen months of the sentence imposed on him on the contempt charge (Tr. 356). He was then confined to the U. S. Penitentiary at Atlanta, Georgia (Tr. 341). Petitioner was released on bail pending decision by this Court in *Green and Winston* v. *United States* (Tr. 362), and by order of the Court of Appeals is presently enlarged on bail pending final action by this Court.

On March 31, 1958 this Court affirmed the conviction of Green and Winston (*Green and Winston* v. *United States*, 356 U. S. 165). A majority of the Court held that federal courts have power to punish as for a contempt disobedience of a surrender order and to punish such contempt in summary proceedings by a term of imprisonment in excess of one year. The majority further held that the record in *Green and Winston* was sufficient to support a finding of petitioners' actual knowledge that the order had been made.* Accordingly it left open the question raised by Green and Winston as to whether mere proof of the prospective issuance of the order would be sufficient to support their convictions. The majority said (*supra* at 174):

> "Since we are satisfied that the record supports these findings [of actual knowledge that the order had been made], we need not consider whether mere notice of the prospective issuance of the order, cf. Pettibone v. United States, 148 U. S. 197, 206-207, 13 S. Ct. 542, 546, 37 L. Ed. 419, would be sufficient to sustain these convictions on the theory that petitioners were chargeable as a matter of law with notice that it was later issued."

Mr. Justice Brennan in a dissenting opinion in *Green and Winston* in which the Chief Justice and Mr. Justices Douglas and Black joined ** disagreed with the majority view as to the existence of sufficient proof of actual knowledge. Accordingly he reached at the question left open by the majority and held that the conviction could not be sustained upon mere proof of knowledge of the prospective issuance of the order (*supra*, at 219-224).

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* In making this finding the majority relied upon certain statements made by Green and Winston at the time of their surrender which indicated knowledge of the language of the order (356 U. S. at 177-178).

** For the concurrence of Mr. Justice Black see 356 U. S. at 217 note 33 and of Mr. Justice Douglas see 356 U. S. at 224.

The record here is to be distinguished from *Green and Winston* in two essentials. In *Green and Winston* there was uncontradicted evidence that Mr. Sacher saw Green and Winston on June 29 and informed them to be present in court on July 2. Here there was no such evidence. In *Green and Winston* there was evidence that upon their surrender Green and Winston made certain statements to the press which indicated familiarity with the language of the surrender order. Here there was no such comparable evidence.

On April 10, 1958, following this Court's decision in *Green and Winston* and before disposition of petitioner's motion under Section 2255, petitioner filed a motion for leave to submit the following additional grounds (Tr. 386, 387-8):

> "A. Defendant was convicted on a charge not made in violation of due process guaranteed by the Fifth Amendment to the United States Constitution in that he was charged with disobedience of an order of July 2, 1951, the existence of which he well knew, whereas, he was convicted for disobedience of an order which he allegedly had notice was to have been entered.
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> B. Defendant was convicted on a charge not made in violation of due process guaranteed by the Fifth Amendment to the Constitution of the United States in that defendant was charged with disobedience of an order of July 2, and convicted of disobedience of an order to appear allegedly made on June 29, 1951.
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> C. The conviction of defendant and its affirmance by the Court of Appeals for the Second Circuit denied defendant the presumption of innocense and was based on a presumption of guilt in violation of due process guaranteed by the Fifth Amendment to the United States Constitution in that the trial court and the Court of Appeals predicated guilt upon the theory that notice of the prospective issuance of the order charged defendant as a matter of law with notice that it was later issued.
>
> D. Defendant was sentenced for an offense not cognizable under the laws of the United States in

that he was convicted for disobedience of an order not yet entered, whereas, the pertinent statute under which defendant was charged and tried, namely 18 U. S. C. A. Sec. 401(3) makes punishable disobedience of an order *in esse*.

E. Defendant was convicted and sentenced on a record so utterly barren of any evidence of either notice that the order of July 2 would be made or of knowledge that the order had, in fact, been entered as to render the judgment arbitrary and void.

F. The sentence imposed on defendant placed him in double jeopardy in violation of the Fifth Amendment to the Constitution of the United States in that the sentencing court, in imposing sentence for the alleged contempt, increased the sentence previously imposed upon defendant for violation of the Smith Act."

On April 18, 1958 Judge Palmieri heard argument on the motion of April 10, 1958 and granted petitioner's motion to include the additional grounds but denied petitioner's motion to vacate, set aside and correct the sentence (App. 16a-17a).*

The judgment was affirmed by the court of appeals on December 2, 1958. It held that a "re-review of the evidence is not a right to be accorded in this proceeding" (Op. 55).**

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* Respondent contended that the remedy under 28 U. S. C. Sec. 2255 was not available to petitioner. Judge Palmieri held (App. 17a):

"While I believe that the request for relief is procedurally proper, I, nevertheless, feel constrained to deny the motions of the defendant for relief * * *.

To put the matter differently, I consider myself bound by the decision of the Court of Appeals referred to above [on direct review] and if it can be said that the scope and application of that decision has, in any way, been modified by the *Green and Winston* decisions that is a matter which must be dealt with by the higher courts."

** Op. refers to the opinion of the Court of Appeals annexed to the within petition.

Nevertheless the court reexamined the evidence "because the opinions in the *Green* case do prompt to careful study • • •" (Op. 56). The court below conceded that the "main issue • • • is whether Thompson knew in fleeing the jurisdiction that the proposed surrender order of July 2, had actually been entered" (Op. 56). It found that the record was sufficient to establish that petitioner had knowledge of the existence of the order. To supply the deficiency in the proof of petitioner's knowledge that the order had been made, the court below relied on facts *de hors* the record in violation of petitioner's constitutional right to be confronted with the evidence and an opportunity to rebut it. It took judicial notice that "the order and its violation was a matter of wide public interest and notoriety, being front page news for the daily papers so that Thompson could hardly avoid knowledge if he so desired" (Op. 58).

The prosecution did not offer evidence at the trial purporting to show that the order and its violation was front page news for the daily papers. Nor did it request that the trial judge take judicial notice of the contents of the daily newspapers. There is nothing in the findings by the trial judge to indicate that he relied upon newspaper accounts of the events of July 2 to support a finding of petitioner's knowledge of the order. Nor does it appear that the court below took this into consideration on direct review.* Moreover, there was no evidence in the record that the newspaper accounts were ever brought to the atten-

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* The request that the court take judicial notice of newspaper accounts first appeared in the prosecution's brief before the Court of Appeals in the proceedings under Section 2255. It said in footnote at p. 27 of its brief: "This Court may judicially note that the newspapers of the nation, and particularly, of New York City, gave prominent notice to the Court proceedings of July 2, including Judge Ryan's signing of the surrender order on that date. See e.g. *The New York Times* of July 3, 1951, page 1, column 1, and the *Daily Worker* of the same date, page 1."

tion of the petitioner. We contend in Section II, *infra*, that judicial notice of a material fact taken for the first time by an appellate court in a criminal case deprives a defendant of his constitutional right to be confronted with the evidence and an opportunity to rebut it. And for this reason such "evidence" must be disregarded. Moreover the court's action in taking judicial notice of front page news suffers from additional substantial infirmities. First, the court's statement of the contents of the daily papers does not accurately reflect the facts. For while it is true that all of the daily papers carried front page coverage of the fact that on July 2, seven of the *Dennis* defendants surrendered for imprisonment and that four had fled, in no paper does it appear that Judge Ryan signed an order directing surrender. Of all the daily papers only the *New York Times* of July 3 and the *Daily Worker* of that date made reference to an order by Judge Ryan. The reference however is ambiguous and does not clearly relate to an order directing surrender.* The *Herald Tribune* of that date, *The New York Post* of July 2 and July 3, and the *World Telegram* of July 2 and July 3 which gave wide coverage to the failure of the four to appear, did not even make an ambiguous reference to an order of surrender by

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* The pertinent language in the *New York Times* appears as follows:

"Their incarceration has been ordered under the Supreme Court decision of June 4, affirming their conviction (p. 1 column 1)

"Mr. Saypol moved that the mandate of the Supreme Court be made the order of the district court * * * Judge Ryan signed the order as requested."

The pertinent language in the *Daily Worker* appears as follows:

"Judge Ryan signed the order for imprisonment * * *

"Four of the Communist leaders were not in court when the mandate was received and the order for their imprisonment was signed."

Judge Ryan.* All of which points to the fact that the contents of a single day's front page news is not the proper subject for judicial notice. Indeed it has been so held. *People* v. *Chambers*, 72 P. (2d) 746, 762. See also 1 *Wharton's Criminal Evidence* (12th Ed.), Sec. 37, pp. 101-103.

The use to which the court below applied the "facts" thus judicially noted is equally invalid. For it imputed to petitioner knowledge of the contents of front page news appearing in some of the newspapers of July 3 in the absence of any evidence whatever that petitioner had access to or read any of these papers. Such imputation of knowledge is in conflict with applicable decisions of this Court, the court below and of courts in other jurisdictions. *United States* v. *Handy*, 351 U. S. 454, 466; *United States* v. *Rosenberg*, 200 F. 2d 666, 670 (C. A. 2); *United States* v. *Hall*, 101 F. Supp. 666, 671 (S. D. N. Y.); *People* v. *Chambers*, *supra*, at 762.**

The basis upon which the court below imputed knowledge of front page news to petitioner and from that inferred petitioner's knowledge that the surrender order had been made is as speculative as was the basis on which the trial judge predicated his finding of petitioner's knowledge of the proposed order. The court below reasoned:

1) The records of the Bureau of Motor Vehicles of New York showed that one John Francis Brennan took a driver's test in Queens, New York, on July 31. 2) There was evidence showing that petitioner eventually assumed the name

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* Front page news of the surrender of the seven and the flight of the four appeared in the daily press on the afternoon of July 2 and on July 3. We therefore make the asumption that these were the days on which the front page news to which the court refers appeared. We have therefore included in our discussion the afternoon press of July 2 as well as July 3.

** Such imputation would be erroneous even if all of the daily press carried front page news that the order of surrender had been signed.

of John Francis Brennan. 3) Ergo petitioner must have been the one who took the driver's test in Queens, on July 31. 4) Ergo petitioner must have lingered in the jurisdiction until at least July 31. 5) Ergo he must have been in the jurisdiction on July 3. 6) Ergo he must have had access to and read the *New York Times* and *Daily Worker* of that date. 7) Ergo he could not have avoided knowledge of the existence of the order.

The weakness in the chain of inferences on which the court below rests its ultimate inferences is apparent. Assuming arguendo that the evidence could support an inference that petitioner took a driver's test in Queens, New York, on July 31, this inference cannot support the further inference that he was in New York on July 3. The probabilities of his whereabouts on July 3 are manifold and cannot be fixed in New York merely because of the inference that he was in New York almost four weeks later. The further inference drawn from these intervening inference, namely, that petitioner must have read the *New York Times* and *Daily Worker*, which as the court must speculatively decide, the petitioner selected from among the other papers in the jurisdiction, is even more improbable. The record shows that petitioner went into hiding before the order was made. Petitioner may have isolated himself from any contact with the public in the immediate period which followed and hence may not have had access to newspapers. It is certainly more likely that he did isolate himself than that he did not. The final inference drawn by the court that petitioner must have learned of the existence of the surrender order from the ambiguous accounts of an order appearing in only two of the papers in the jurisdiction, is impermissible for it rests upon a series of intervening inferences each of which are based upon speculation or at best bare probability. I *Wigmore on Evidence* (3d ed. 1940) Sec. 41 pp. 438-441. In reviewing the evidence, the court below applied a rule as to standards of proof which is in conflict with the rule adopted by courts

in other jurisdictions. It held (Op. 59) that the standards of proof in a criminal case are no different than in a civil case. Hence it applied to the evidence in this case the preponderance of the evidence rule applicable to civil cases.

On its view of the record, the court below held that the remedy under Section 2255 was not available to petitioner. Hence it did not reach at the question of the availability of the remedy under the circumstances which we urge prevail here, namely that petitioner's conviction was obtained in violation of his constitutional right to due process and that the court was without jurisdiction to impose sentence in that petitioner's conviction rested on an erroneous and unconstitutional construction of 18 U. S. C. 401(3) which resulted in a conviction on a charge not made, for an offense not cognizable under our laws and on a record so barren of proof of knowledge as to render the judgment arbitrary and void.

The court below did not discuss petitioner's contention that in imposing sentence on the contempt charge the trial judge increased petitioner's sentence under the Smith Act thereby placing petitioner in double jeopardy.

Reasons for Granting the Writ

This case presents important questions of federal law which have not been but should be settled by this Court and to the extent that related decisions are applicable, it has been decided in conflict with decisions of this Court and courts in other jurisdictions. In addition the court below in deciding the case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision

In summary, petitioner contends that his conviction and sentence rest upon a fundamental unfairness and a deprivation of his constitutional right to due process. The essence

of the fundamental unfairness, of which he complains, is the unusual use of the contempt power to punish him for conduct which points merely to the act of jumping bail to avoid imprisonment. Such conduct, reprehensible as it was, did not constitute an offense under federal law at the time of its commission. The mere fact that an order was made directing him to surrender does not in itself convert his conduct into an offense punishable as a contempt. Proof of petitioner's knowledge of the existence and command of the order was essential to convert his conduct into a criminal contempt under 18 U. S. C. 401(3). The record is wholly barren of such proof. The deficiency in proof was supplied by a process of speculation and conjecture, on a rule as to the standards of proof in conflict with the rule applied in other jurisdictions and which virtually obliterates the requirement in a criminal case that proof of guilt be established beyond a reasonable doubt. In addition the trial judge construed 18 U. S. C. Sec. 401(3) as authorizing conviction in a criminal case on proof of constructive knowledge. This construction of the statute was applied for the first time in its history in the instant case and the case of *United States* v. *Hall*, 198 F. 2d 726, cert. den. 345 U. S. 905, and is in conflict with applicable decisions. This question has never been settled by this Court. The importance of this question to the proper administration of federal criminal justice is manifest. For the construction of the contempt statute on which petitioner's conviction and sentence rest sanctions an unwarranted extension of the criminal contempt power of the courts, unauthorized by the contempt statute and in conflict with its legislative purposes. Moreover it resulted in a conviction in this case on a charge not made for an offense not cognizable under our laws in derogation of petitioner's right to procedural due process.

The question of the fundamental unfairness and deprivation of due process which, petitioner urges, tainted the conviction and sentence, was decided by the court below in

a manner which deprived petitioner of his constitutional right to be confronted with the evidence and an opportunity to rebut it. For the court below sought to convert the basis upon which petitioner's conviction and sentence rest from that of constructive knowledge of the order to actual knowledge of the order, by supplying the deficiency in proof with alleged facts *de hors* the record of which it took judicial notice and which was not the proper subject of judicial notice. In this respect the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.

And finally, this case presents questions as to the scope of the remedy under Section 2255 which are of grave importance in the administration of federal criminal justice. The court below in holding that the remedy under Section 2255 is not available to petitioner under the circumstances of this case has decided an important question of federal law, which, insofar as it turns upon the availability of the remedy to review a claim of error in statutory construction, has not been decided by this Court. *Ladner v. United States,* 358 U. S. 169. Insofar as the questions we raise turn upon a deprivation of procedural due process, the decision of the court below is in conflict with applicable decisions of this Court.

The importance of the question of the scope of collateral attack on criminal sentences in the federal administration of criminal justice was recently noted by this Court in *Ladner, supra* (at 173) when it said: "The question of the scope of collateral attack upon criminal sentences is an important and complex one, judging from the number of decisions discussing it in District Courts and Courts of Appeals. We think we should have the benefit of full argument before dealing with the question."

I. Petitioner's conviction and sentence rest upon a deprivation of his constitutional right to due process.

A. Petitioner was convicted on the theory that notice of the prospective issuance of the order charged him as a matter of law with knowledge that it was later made. But punishment for criminal contempt under 18 U. S. C. Section 401(3) requires proof of the alleged contemnor's actual knowledge of the existence and command of the order he is charged with having disobeyed.

The theory of guilt applied by the trial judge was based upon the decision of the court below in *Hall* (App. 9a-10a). Similarly, the court below affirmed the conviction on the authority of that case. Some discussion of that case, therefore is essential to understand the basis on which petitioner's conviction and sentence rest.

Hall, the first of the absconding *Dennis* defendants to be apprehended, was charged with criminal contempt under 18 U. S. C. Sec. 401(3) by reason of his knowing disobedience of the surrender order of July 2. In that case there was no evidence that Hall had actual knowledge of the existence and command of the order. All that the record showed was that he had knowledge that this imprisonment was imminent; that on June 29, after service of the proposed order on mandate on counsel, he was advised by counsel to be present in court on July 2; that he was last seen on June 30 leaving his New York apartment carrying two suit cases; and that at the time he was apprehended his hair was dyed dark brown, his mustache had been removed and he weighed twenty pounds less (*Hall, supra*, at p. 730). A majority of the court, Judge Biggs dissenting, held that notice of the prospective issuance of the order charged Hall as a matter of law with knowledge that it was later made. Thus the court (at p. 730) held that the record supported a finding that "respondent had complete notice of the order and wilfully disobeyed". To this it added (*id.* note 7):

> "That this was a notice to appear for the order of commitment, rather than that order itself, raises no question; the notice, too, formed part of the court's command. See *Pettibone* v. *United States*, 148 U. S. 197, 206."

The court's theory of guilt is explained by the passage from the *Pettibone* case upon which it relied. The passage reads (148 U. S. at 206, emphasis supplied):

> "In matters of contempt, persons are not held liable for the breach of a restraining order or injunction unless they know or have notice, or are chargeable with knowledge or notice, that the writ has been issued, or the order entered, *or at least that application is to be made;* but without service of the process or knowledge or *notice or information of the pendency of the proceedings*, a violation cannot be made out. 2 Dan. Chan. Pr. (4th Amer. ed.) 1684; 2 High on Injunctions (3d ed.) Secs. 1421, 1452; *Winslow* v. *Nayson*, 113 Mass. 411."

The court's citation of this passage indicates that it sustained Hall's conviction on the theory that notice to him that an application would be made for the order of July 2, 1951,* followed by his flight, was sufficient to sustain the charge that he was in criminal contempt of the order once it was entered. But the statement in *Pettibone*, quoted above, that a person who has notice of an application for an injunction may be held liable for its breach, is inapplicable to liability for *criminal* contempt. The passage containing this statement was dictum in which this Court did not distinguish between civil and criminal contempts. Moreover the three authorities which the opinion cites state unequivocally that actual knowledge of the making of an order is prerequisite to a conviction for contempt of its

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* Notice to Hall that an application for an order directing his surrender would be made on July 2, was inferred from the evidence that on June 29, Mr. Sacher advised Hall to be present in court on July 2 (*Hall*, *supra*, at p. 730).

provisions. Hence it is clear from *Pettibone's* citation of these authorities that this Court did not intend to intimate that a person may be held guilty of criminal contempt without proof of actual knowledge of the existence of the order he is charged with disobeying.

As we have observed herein petitioner was convicted on the authority of *Hall* which the trial judge held "furnishes the definite yardstick which must be kept before us, in an analysis of the evidence adduced by the Government in determining whether or not the respondent is guilty of the contempt charge" (App. 9a-10a). An analysis of the evidence on which the trial judge relied to support his ultimate finding that "Thompson had notice and knowledge of the order of July 2, 1951 made by Judge Ryan and that he willfully and contumaciously disobeyed the terms of that order" (App. 13a), further demonstrates that he rested petitioner's conviction on the theory of constructive knowledge applied by the court in Hall. We will not here set forth this analysis but direct the Court's attention to our analysis of the evidence appearing at pages 6-16, *supra*.

Until the decision by the court below in *Hall*, and in the instant case, the principle was firmly established that proof of an alleged contemnor's actual knowledge of the existence and command of the order is essential to support a conviction for contempt of an order of the court. *Kelton* v. *United States*, 3 Cir., 294 F. 491; *In re Kwelman*, D. C., 31 F. Supp. 23; see *Wilson* v. *State of North Carolina*, 169 U. S. 586, 596-600. Research has disclosed no case other than *Hall* and the instant case which holds that knowledge of the prospective issuance of the order charges an alleged contemnor in a criminal contempt case with knowledge that it was later made. Contrariwise it has been held that a defendant in a suit for an injunction cannot be held in criminal contempt for violating the injunction after learning that the case had been decided against him but before being informed that the court had directed that the injunc-

tion issue. *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 124 F. 786, aff'd 129 F. 1005. Furthermore this Court has held that disobedience of an order after knowledge that it had made but before its effective date could not support a contempt conviction. *Foster* v. *Kansas*, 112 U. S. 201. The theory on which the conviction rests denies petitioner the presumption of innocence and violates due process. *Cf. Tot* v. *United States*, 319 U. S. 463.

The question presented here was raised but not decided by the majority in *Green and Winston, supra*, (at 174) and was decided in our favor by four dissenting Justices in that case (at 219-224).

The theory that criminal contempts may be sustained on proof of constructive knowledge of the order constitutes an unwarranted expansion of the summary contempt powers of the courts, in conflict with the legislative purpose of the contempt statute. *Cf. Cammer* v. *United States*, 350 U. S. 399, 403-404; *Nye* v. *United States*, 313 U. S. 33, 52, 53. Moreover the broad construction of 18 U. S. C. 401(3) on which petitioner's conviction and sentence rest raises serious constitutional problems. Proof of actual knowledge of the existence and command of the order the alleged contemnor is charged with having disobeyed is a substantive requirement in a criminal contempt case. For it is the defiance of the court order which constitutes the offense. Without actual knowledge of the existence of the order there can be no defiance of its command. As Judge Biggs noted in his dissent in *Hall* (at p. 734) proof of actual knowledge is a "constitutional requirement under all circumstances". It is this knowledge which converts an otherwise lawful act into an unlawful one. To construe 18 U. S. C. Sec. 401 (3) as authorizing punishment for contempt upon proof of constructive knowledge runs counter to the due process requirement that punishment may not be imposed without

warning that the conduct constitutes an offense.* *Screws v. United States*, 325 U. S. 91, 101; *Musser v. Utah*, 333 U. S. 95, 97; *Winters v. New York*, 333 U. S. 507, 515, 516. Thus proof of actual knowledge of the existence and command of the order is a prerequisite to a constitutional construction of 18 U. S. C. Sec. 401(3). *Cf. American Communications Assoc. v. Douds*, 339 U. S. 382 where this Court observed (at p. 413):

> "And since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, *the fact that punishment is restricted to acts done with knowledge that they contravene* the statute makes this objection untenable". (Emphasis added.)

This consideration, in itself would support the narrower construction adopted by the dissenting Justices of this Court in *Green and Winston*.

B. Petitioner was convicted on a charge not made in violation of his constitutional right to due process.

Petitioner was charged with the knowing disobedience of the outstanding order of July 2, 1951 (Tr. 204, 208, 215, 444-5) but was convicted for disobedience of an order which he allegedly had notice was to have been entered. Mr. Justice Brennan in *Green and Winston* in discussing this theory of knowledge said (at 222):

> "*First.* Manifestly, foreknowledge that an order might come into existence does not prove knowledge

* The prejudice to petitioner's right to be apprised that his conduct constitutes an offense is compounded by the fact as noted by Mr. Justice Black in his dissent in *Green and Winston*, that (at 207): "Insofar as this particular case is concerned the Government frankly concedes that it cannot point to a single instance in the entire course of Anglo-American legal history prior to this prosecution and two related contemporary cases where a defendant has been punished for criminal contempt by summary trial after fleeing from court-ordered imprisonment."

that it did come into existence. Even if the petitioners knew on June 29 that the order was likely to be signed on July 2, the most that can be said is that after July 2 the petitioners knew that the order *was to have been entered.* This, of course, is not the same as knowledge that the order *had been* entered, and it is the latter knowledge which the government must prove beyond a reasonable doubt. Knowledge that the order *had been entered,* of course could only be acquired by the petitioners after the order had come into existence on the morning of July 2; and that knowledge can hardly be inferred from the events which occurred prior to the moment the order was entered. See the dissenting opinion of Judge Biggs in *United States* v. *Hall,* 2 Cir., 198 F. 2d 726, 733-755.*

The Government's lack of confidence in the proofs to show actual knowledge is implicit in its effort to sustain the convictions on a theory of constructive knowledge derived from the events of June 28 and from the evidence that on June 29 the petitioners and the other Dennis defendants were told by the attorneys that they must be in court on July 2. The short answer to this contention is that the petitioners are not charged with disobedience of an order of which they had *constructive* knowledge but with disobedience of an order of which they had actual knowledge and conviction can be had on the precise charge, or not at all." (Emphasis in original).

Conviction on a charge not made constitutes a sheer denial of due process. *Cole* v. *State of Arkansas,* 333 U. S. 196; *De Jonge* v. *State of Oregon,* 299 U. S. 353, 362.

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* The court below placed great stress on evidence of flight as proof of after acquired knowledge. But to sustain the inferences which it drew it was compelled to rely upon facts *de hors* the record which it improperly imputed to petitioner.

C. Petitioner was sentenced for an offense not cognizable under the laws of the United States in that he was convicted for disobedience of an order not yet entered, whereas the pertinent statute under which appellant was charged and tried, namely 18 U. S. C. Section 401(3) makes punishable disobedience of an order *in esse*.

The order in question did not come into being until Judge Ryan signed the proposed order on mandate on July 2, 1951. Petitioner fled one day before the order was signed. Assuming the validity of the inferences drawn by the trial judge all that the evidence shows is that petitioner had notice that an order might be made on July 2. There was no evidence whatever that he learned that the order had been made. Hence he was convicted for disobedience of an order not yet entered. However, the plain intent of Congress was to make punishable disobedience of an order *in esse*. Any other construction would attribute to Congress an intent to confer upon courts the power to punish constructive contempts. That such was not its intent is plain from the language of the statute and its legislative history. *United States* v. *Day*, 25 Fed. Cas. No. 14934, at p. 794. *Cf. Foster* v. *Kansas*, 112 U. S. 201, where this Court held that a person may not be held in contempt of court for disobedience of an order of the court before the order became effective even though he knew that such order had been made. See also *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 124 F. 736, 737, aff'd 129 F. 1005.

As Judge Biggs said in *Hall, supra*, (at 735):

> "The constitutional question aside, can it be said that Congress in enacting Section 401, Title 18, U. S. C. intended its provisions to have the United States base convictions for criminal contempt on orders not yet entered? When the Statute speaks of an 'order', the reasonable conclusion is that it means an order *in esse*."

In view of the foregoing appellant was convicted for an offense not cognizable under our laws and the court was without jurisdiction to impose sentence. *Pettibone v. United States*, 148 U. S. 197, 203.

D. Petitioner's conviction and sentence rest upon a record so utterly barren of proof of either constructive or actual knowledge of the existence of the surrender order as to render the judgment arbitrary and void. The court below applied a rule with respect to the standards of proof, which is in conflict with applicable rules in other jurisdictions and which in any event should not be applied in summary proceedings for criminal contempt.

We contend here that whatever view is taken as to the nature of the knowledge essential to support a conviction under 18 U. S. C. Sec. 401 (3) on the charge in this *case, the record here is so utterly barren of proof of* knowledge, constructive or actual as to render the judgment arbitrary and void. We will not here burden the Court with a repetition of an anlysis of the evidence. We respectfully direct this Court's attention to our analysis appearing at pages 6-16, 22-26, *supra*. This analysis demonstrates that all that the record shows is that petitioner fled from impending imprisonment. The absence of proof of petitioner's knowledge of the proposed order, essential to support the conviction on the theory adopted by the trial judge, was supplied by a process of speculation and conjecture (pp. 8-13, *supra*). The absence of proof of petitioner's knowledge that the order had been made, was supplied by the court below in the instant proceeding by importing into the record, via judicial notice, alleged facts which did not appear in the record below, and which were not the proper subject of judicial notice. Such action by the court is in derogation of petitioner's constitutional right to be confronted with the evidence against him and

an opportunity to rebut it. We contend in Section II; *infra*, that the court was in error in so doing and that such "evidence" must be disregarded. Moreover to reach its ultimate conclusion as to petitioner's knowledge that the order had been made the court below was compelled to add to the fact judicially noted a process of speculation and conjecture (see pp. 24-26, *supra*).

Fundamental to our system of jurisprudence is the proposition that no man's liberty may be taken away on possibilities, conjecture or even bare probabilities. 1 *Wigmore on Evidence* (3rd ed., 1940), Sec. 41, pp. 438-441. The construction of the facts adopted by the court below runs counter to this fundamental proposition.

In addition the court below applied to this case a rule as to the standard of proof which in practical effect obliterates the requirement in a criminal case that proof of guilt be established beyond a reasonable doubt. The rule as to the standard of proof applied by the court below adopts as the test the preponderance of proof rule applicable in civil cases (Op. 59).* This rule is in conflict with decisions in other circuits.** *Holland* v. *United States*, 348

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* The rule is more clearly delineated in *United States* v. *Masiello* (2 Cir.), 235 F. 2d 279, 284-285 and *United States* v. *Feinberg* (2 Cir.), 140 F. 2d 592, 594. The late Judge Frank, in a separate concurring opinion in *Masiello*, *supra*, vigorously challenges the rule, urging that in practical effect it obliterates the requirement in a criminal case that proof of guilt be established beyond a reasonable doubt.

** *Rent* v. *United States* (5 Cir.), 209 F. 2d 893, 899; *United States* v. *Matsinger* (3 Cir.), 191 F. 2d 1014, 1016; *Candler* v. *United States* (5 Cir.), 146 F. 2d 424, 426; *Williams* v. *United States*, 140 F. 2d 351, 352; *Kassin* v. *United States* (5 Cir.), 87 F. 2d 183, 184; *Paul* v. *United States* (3 Cir.), 79 F. 2d 561, 563-564; *Warner* v. *United States* (10 Cir.), 60 F. 2d 700; *Lempie* v. *United States* (9 Cir.), 39 F. 2d 19, 21; *Moore* v. *United States* (10 Cir.), 56 F. 2d 794, 796; *Yusem* v. *United States* (3 Cir.), 8 F. 2d 6, 8; *Wright* v. *United States* (8 Cir.), 227 F. 855, 857; *Union Pacific Coal Co.* v. *United States* (8 Cir.), 173 F. 737, 740.

U. S. 121, cited by the court below, lends no authority to its rule. This court in discussing the evidence in Holland, said (at 126): "unlike civil actions * * * the prosecution must always prove the criminal charge beyond a reasonable doubt" and (at 138) "the Government must * * * prove every element of the offense beyond a reasonable doubt, though not to a mathematical certainty".

Whatever rational basis exists for the rule adopted by the court below in the ordinary criminal case its application in criminal cases involving the summary contempt power of the courts poses special problems. For, a defendant in a criminal contempt case, tried in summary proceedings, unaccompanied by the safeguard of indictment by grand jury and trial by jury, faces the added hazard of a fact finding body which reposes in a single person. (Cf. Mr. Justice Black, in *Green and Winston, supra*, at p. 217 note 33). Added to this is the fact that the power of the court to impose sentence in such a case is unlimited by statute. In this case petitioner was sentenced to a term of imprisonment of four years. Petitioner's deprivation of liberty for that extended period should not be permitted to rest upon the rule as to the standard of proof adopted by the court below. At the very least, in a criminal contempt case, tried in summary proceedings, the finding of fact by the judge should be subjected to those standards of review which compel that proof of guilt be established beyond a reasonable doubt.

II. The fundamental unfairness which taints petitioner's conviction and sentence was compounded by the court below. For the court below supplied the deficiency in proof by considering facts *de hors* the record in derogation of petitioner's constitutional right to be confronted by the evidence and an opportunity to rebut it.

In reviewing the evidence the court below took judicial notice that the signing of the order was front page news of the daily papers and concluded that petitioner "could hardly avoid knowledge if he so desired" (Op. 58). No request was made at the trial that the court take judicial notice of newspaper reports of the events of July 2. The request was first made by respondent in its brief before the court below on the review of the denial of petitioner's motion under Section 2255.* That the fact thus judicially noticed was a material fact needs no argument. For it was a major link in the chain of inferences on which the court below relied to support its finding of proof of petitioner's knowledge that the order had been made.

The extension of the doctrine of judicial notice by an appellate court to embrace facts *de hors* the record, which are material to proof of the commission of the offense in a criminal case, is, insofar as we have been able to ascertain, without precedent. An authority on evidence in criminal cases notes that the weight of authority holds that judicial notice of facts as distinguished from laws may not be taken on appeal if they were not called to the attention of the trial court and were not judicially noted by it. *Wharton's Criminal Evidence* (12th ed.) page 98. Cf. 9 *Wigmore On Evidence* (3rd ed.) Sec. 2568, page 536, note

* A similar request was made of this Court by the Government in its brief in *Green and Winston* at page 24, note 2. This Court apparently declined to take judicial notice of the newspaper reports for it makes no reference to these reports in its opinion.

1; *Firemen's Fund Insurance Company* v. *Wilburn Boat Company* (C. A. 5, 1958), 259 F. 2d 662, 664; *People* v. *Chambers*, 72 P. (2d) 746, 761-762. Moreover, as we have demonstrated herein the alleged fact judicially noted by the court below is neither a proper subject for judicial notice nor an accurate reflection of the contents of the daily papers. (See pages 23-24, *supra*.)

This Court, in a recent decision, declined to consider certain newspaper reports which were referred to for the first time in petitioner's brief to the Court in support of his claim of a denial of due process. *Ciucci* v. *State*, 356 U. S. 571, 573.*

The fair hearing essential to meet minimum requirements of due process, includes the opportunity of an accused to know of adverse evidence and to be heard concerning its truth, relevancy and significance. *Chernekoff* v. *U. S.* (C. A. 9), 219 F. 2d 721, 723; *U. S.* v. *Dillman* (C. A. 5), 146 F. 2d 572, 574, cert. den. 325 U. S. 870.

Here petitioner was deprived of his right to be confronted with the evidence and an opportunity to rebut it. It may very well be that had the trial court received evidence of the newspaper accounts or judicially noticed them petitioner would have offered countervailing evidence as to their contents. He may also have offered evidence tending to show that he was nowhere in the vicinity where such accounts were published or that he had remained in hiding for some time after July 1 and had had no access to news-

* In that case petitioner was charged in four separate indictments with murdering his wife and three children, all of whom were found dead in a burning building. Petitioner was tried in three successive trials, in the first two of which the jury fixed a penalty of imprisonment and in the third the penalty was fixed at death. The newspaper articles appended to petitioner's brief before this Court attributed to the prosecution certain statements expressing extreme dissatisfaction with the prison sentence fixed by the jury and announcing a determination to prosecute until the death penalty was obtained.

papers. The fact that petitioner did not testify in his defense does not dispose of his right to do so if he believed that the evidence required rebuttal. Nor does that fact preclude the possibility that he might have tendered witnesses as to his whereabouts at the time in question. Certainly, it is not for the court to decide whether petitioner would have or could have rebutted the inference that the newspaper accounts were brought to his attention. His right to do so is a fundamental guarantee of due process and of this right he was deprived.

III. The sentence imposed on petitioner placed him in double jeopardy in violation of the Fifth Amendment to the Constitution of the United States.

We contend here that the four-year sentence which the trial judge imposed on petitioner following his conviction on the contempt charge placed him in double jeopardy in that it included an increase in the sentence previously imposed on petitioner on the Smith Act conviction after he had commenced service of that sentence.

The record shows that after the trial judge imposed sentence counsel for petitioner voiced objection to its severity and moved for reconsideration. In response the trial judge said (Tr. 197):

> "I am considering Mrs. Kaufman, the fact that he was a fugitive for over 25 months, and *the fact that at the time of the original sentence he did not get the same as the other defendants.* He was given—he was afforded a real break by Judge Medina." (Emphasis added.)*

* Each of the *Dennis* defendants except petitioner was sentenced on the Smith Act conviction to a term of imprisonment of five years. Petitioner, however, was given a three year sentence because of his outstanding record of service to this Country during World War II, which included the Distinguished Service Cross for extraordinary heroism in battle (Def. Exhs. A-C, incl.; Tr. 162-7).

At another point in the colloquy between the trial judge and petitioner's counsel, the judge said (Tr. 200):

> "I thought at first of imposing a sentence *which would require him to serve the same sentence as the sentence of every other defendant in the Dennis case, particularly Mr. Gus Hall*, but again I have taken into consideration the fact that he has a good war record." (Emphasis added.)

Thereupon the following colloquy took place between counsel and the judge (Tr. 200-1):

> "Mrs. Kaufman: I am sorry but I don't understand. It is your Honor's position that you are adding to Mr. Thompson's sentence what he should have gotten under the Smith Act case?
>
> The Court: Of course not.
>
> Mrs. Kaufman: You said it is your determination that he should serve the same sentence as the others.
>
> The Court: I said I had thought, Mrs. Kaufman, if you had listened to me, of making the sentence on the charge now before me of such duration that he would serve the same time as Gus Hall would serve.
>
> Mrs. Kaufman: Gus Hall's was a three-year sentence for this criminal contempt.
>
> The Court: That is true but he is going to serve eight years altogether.
>
> Mrs. Kaufman: So, in effect, your Honor is adding to the Smith Act sentence which was imposed.
>
> The Court: Of course I am not.
>
> Mrs. Kaufman: It would seem that way to me.
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> The Court: I think, under all the facts in this case, the length of time this man was a fugitive and all the other facts developed in the course of trial, indicate that the prison term, such as I handed out, should be in fact imposed on this defendant."

It is manifest from the foregoing colloquy that the trial judge in imposing sentence, in effect increased the sentence on the Smith Act conviction previously imposed on petitioner. His determination to do so is reflected not only in

his remarks that he thought at first of requiring petitioner to "*serve the same sentence as the sentence of every other defendant in the Dennis case, particularly Mr. Gus Hall*" but also appears in the yardstick he ultimately applied in determining petitioner's sentence. For the yardstick the judge applied, and which demonstrates that he did not abandon his intent to increase the Smith Act sentence, was the combined total of Hall's Smith Act sentence of five years and the contempt sentence of three years. With that yardstick in mind the trial judge then considered petitioner's war record and imposed a sentence which resulted in a total of seven years as distinguished from Hall's total of eight years.

We respectfully submit that despite the trial judge's disavowal of an intention to increase petitioner's sentence on the Smith Act conviction this is the plain effect of what he did. As this Court said in *Townsend* v. *Burke*, 334 U. S. 736, at 740:

> "We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving."

The sentence, therefore, which the trial court allegedly imposed as punishment on the contempt conviction included additional punishment on the Smith Act conviction. This the court was without power to do for it placed petitioner in double jeopardy in violation of his guarantees under the Fifth Amendment to the United States Constitution. *Ex parte Lange*, 18 Wall 163. Accordingly the sentence is void and should be vacated.

IV. The remedy under 28 U. S. C. Section 2255 is available to petitioner under the circumstances in this case.

The law is well settled that Section 2255 embraces the same principles as those which obtain in a collateral attack upon a judgment by way of habeas corpus proceedings. *United States* v. *Morgan*, 346 U. S. 502 (1954); *United States* v. *Hayman*, 342 U. S. 205 (1952). Its legislative history plainly discloses congressional intent to make the remedy "much broader than, *coram nobis*" and "as broad as habeas corpus". *United States* v. *Hayman*, *supra*, at 216-217. Nevertheless the court below narrowly construed the statute as "the modern equivalent of a writ of error *coram nobis*" (Op. 55). Under the narrow construction of Section 2255 adopted by the court below it held (Op. 55) that the remedy under Section 2255 was not available to petitioner since

> "This appeal can do no more than retest the evidence upon which Judge Noonan acted in his holding Thompson to have had knowledge of the district court order he disobeyed by flight. It does seem to us that such a review of the evidence is not a right to be accorded in this proceeding. * * *".

Implicit in this holding is the court's view that the issues presented under petitioner's motion merely involve the question of the sufficiency of the evidence. To reach at this view the court below was compelled to disregard the basis on which the conviction rests, namely, the theory that constructive knowledge is sufficient to support a conviction for criminal contempt. It chose to substitute a new basis, one not relied on by the trial judge or the court below on direct review, namely that proof of actual knowledge is essential. But the action by the court below in thus converting the basis of the conviction is impermissible for, it is not founded on the record. (Cf. *Cole* v. *Arkansas*, 333 U. S. 196). It rests upon consideration of material facts

de hors the record, in violation of petitioner's constitutional right to be confronted with the evidence and an opportunity to rebut it. In addition it rests upon a rule as to standards of proof, which in practical effect obliterates the requirement in a criminal case that proof of guilt be established beyond a reasonable doubt. Thus, the court did not dispose of petitioner's contention that his conviction rests upon an erroneous construction of the statute which resulted in his conviction on a charge not made for an offense not cognizable under our laws. It merely compounded the fundamental unfairness which taints petitioner's conviction and sentence. Under these circumstances, it cannot be said that what petitioner seeks here is merely a "re-review of the evidence".

The Government in its brief and argument below urged that the remedy is unavailable to petitioner because the issues raised were or could have been raised on direct appeal and cites in support thereof the often quoted general rule that the writ of habeas corpus will not be allowed to do service for an appeal. But as this Court has repeatedly held "the rule which requires resort to appellate procedure for the correction of errors 'is not one defining power but one which relates to the appropriate exercise of power'. The rule is therefore not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent". *Sunal* v. *Large*, 332 U. S. 174, 180; and cases cited therein.

In *Ex parte Hudgings*, 249 U. S. 378, a case involving the power of the court to punish perjury as a contempt, this court held (at 184):

> "In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a

> witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected we are of the opinion that the case is an exception to the general rules of procedure to which we have at the outset referred, and therefore that our duty exacts that we finally dispose of the questions in the proceedings for habeas corpus which is before us."

We respectfully submit that substantially the same exceptional circumstances obtain in the case at bar. The rule that proof of constructive knowledge is sufficient to support a conviction for criminal contempt of an order of the court was applied for the first time in the instant case and in *Hall*. This Court has never decided the question. Hence the impact of the rule goes far beyond the case at bar. It sanctions an unwarranted expansion of the summary power of the courts in criminal contempt cases. The fact that this Court recently construed the summary contempt power of the court as authorizing severe punishment by a term of imprisonment in excess of one year without the constitutional safeguards of indictment by grand jury and trial by jury, (*Green and Winston, supra*), and which resulted in this case in a sentence of four years of imprisonment adds urgency to the question.*

Moreover, we submit that the rule has no application to a case where the defendant pursued the appellate route on direct review and failed. The rule was intended to apply only to a case in which the defendant chose to bypass direct review and was designed to promote orderly processes in criminal cases. *Sunal v. Large*, 332 U. S. 174, 181-182.

In *Sunal v. Large, supra*, the petitioners were convicted for refusal to submit to induction. At the trial the court excluded evidence tending to show that the selective service

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* It should be noted that the power of the court to impose sentence for criminal contempt is unlimited by statute.

classification was invalid. At the time of the convictions the lower courts had consistently ruled that selective service classifications could not be attacked in criminal proceedings and certiorari had been denied in cases raising the same issue. Petitioners did not appeal from the convictions. Subsequently this Court held in another case that evidence attacking the validity of the classification was relevant. It was then that petitioners filed their writs of habeas corpus. This Court found (at 182) that the error complained of "did not infect the trial with lack of procedural due process". It further found (at 183-184) that there were no exceptional circumstances there which justified the exercise of the writ.* In ruling that the remedy of collateral attack was not available to petitioners, the Court said (at 182):

> "*Of course, if Sunal and Kutick had pursued the appellate course and failed, their cases would be quite different.* But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile." (Emphasis added.)

It is plain from the foregoing that despite its holding that the question raised did not infect the trial with lack of procedural due process, the Court would have considered the remedy appropriate if the petitioners had pursued

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* Petitioners contended that the exceptional circumstances existed by virtue of the fact that at the time of the convictions appeal seemed futile, since this Court had denied certiorari in a case raising the identical question. It was only after their time to appeal had lapsed that this Court decided the question in their favor. Unlike the case at bar, in *Sunal* v. *Large*, the merits of petitioners' contention was disposed of by this Court in another case. Hence the issue was not one of general importance in the administration of criminal justice. The issues in the case at bar transcend the individual interest of petitioner. For the merits of the issues in this case has never been decided by this Court.

the appellate route and failed.* Here petitioner had pursued the appellate route and failed. Here petitioner asserts a deprivation of procedural due process on so fundamental a level as conviction on a charge not made as well as lack of jurisdiction by virtue of the fact that appellant was convicted for an offense not cognizable under our law.**

Petitioner's right to relief, even under the narrow view of the availability of the remedy of collateral attack where the appellate route of direct review has been bypassed, is clear. For even in a case where the appellate route has been bypassed, the court could, in the appropriate exercise of its power, review error which involves the jurisdiction of the court and "trench on any constitutional rights of the defendants." That this includes deprivation of the right to procedural due process is not only well established in a long line of cases,*** but is implicit in the Court's denial of

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* Mr. Justice Rutledge, in his dissenting opinion in *Sunal* corrobates our view of the impact of the statement quoted above. He said (at 190):

> "But any effort to shut off the writ's functioning merely because appeal has not been taken in a situation where, but for that fact alone, the writ would issue, seems to me to prescribe a system of forfeitures in the last area where such a system should prevail. Certainly a basic miscarriage of justice is no less great or harmful, either to the individual or to the general cause of personal liberty, merely because appeal has not been taken, than where appeal is taken but relief is wrongfully denied."

** Even assuming that petitioner's contentions do not rise to the level of a deprivation of procedural due process, certainly the issues raised here are as compelling, if not more so, as the issues in *Sunal* v. *Large*, which the Court indicated would have afforded basis for relief in circumstances such as obtains here.

*** *Moore* v. *Dempsey*, 216 U. S. 86; *Mooney* v. *Holahan*, 294 U. S. 103; *Johnson* v. *Zerbst*, 304 U. S. 458; *Chambers* v. *Florida*, 309 U. S. 227; *Smith* v. *O'Grady*, 312 U. S. 329; *Waley* v. *Johnston*, 316 U. S. 101; *Brown* v. *Allen*, 344 U. S. 443; *Leyra* v. *Denno*, 347 U. S. 556; *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664 (C. A. 3).

relief to the petitioners in *Sunal* v. *Large*. For it rests its denial on the grounds that the error there complained of "did not infect the trial with lack of procedural due process".

The question of the availability of the remedy to test a claim of error in statutory construction was recently discussed by this Court in *Ladner* v. *United States*, 358 U. S. 169. In that case, petitioner was convicted on two separate counts for assault on two Federal officers and sentenced to consecutive sentences on each count. Petitioner contended that he was guilty of only a single assault since the evidence showed that both officers were wounded by a single shot. The trial court held that under the statute the wounding of two federal officers from a single discharge of a shot gun constituted separate offense against each officer. Petitioner sought relief in a proceeding under Section 2255. The Government did not tender the question of the availability of the remedy in its brief before this Court as a question Presented for Decision. Accordingly the Court declined to pass on this question although it granted petitioner relief. The Court said (at 173):

> "The question of the scope of collateral attack upon criminal sentences is an important and complex one, judging from the number of decisions discussing it in the District Courts and the Courts of Appeals. We think that we should have the benefit of a full argument before dealing with the question. We therefore, proceed to construe former 18 U. S. C. Section 254 without, however, intimating any view as to the availability of a collateral remedy in another case where that question is properly raised, and is adequately briefed and argued in this Court."

The issue there raised is squarely presented here. In addition we urge that the trial court so construed the statute as to render it unconstitutionally vague. Thus the issue as to the right to relief from an erroneous statutory construction is even more compelling in the case at bar.

Finally, we respectfully submit that the court below was in error in holding that petitioner is barred from relief because the issues tendered require a re-review of the evidence. The mere fact that a determination of petitioner's contention that his conviction was obtained in violation of his constitutional right to due process requires a consideration of the evidence does not preclude him from relief under Section 2255. For it does not of itself denude the issues of their essential constitutional and jurisdictional character. If petitioner was, as we contend, convicted on a charge not made for an offense not cognizable under our laws on an erroneous construction of the statute involved then the conviction and sentence are open to collateral attack whatever record is required to determine the question. *Cf. Ladner, supra*, where this Court after holding that the statute on which the defendant's conviction rested was erroneously construed remanded the case for further proceedings to determine whether the evidence, in the light of a proper construction of the statute, was sufficient to support the conviction for two separate offenses.* See also *Harlan* v. *McGourin*, 218 U. S. 442, 448.**

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* That the full scope of the question discussed by the Court in *Ladner* involves the availability of the remedy in a case involving statutory construction *where the right to relief requires a review of the evidence* is made plain in Mr. Justice Clark's dissenting opinion in *Ladner, supra*, at 179.

** In that case the Court held that the sufficiency of the evidence could not be reviewed in a collateral proceeding. However, it plainly indicated that the mere fact that a determination of questions raised on a collateral attack required a review of the evidence, would not constitute a bar to relief. The Court said (at 448):

> "No objection is made to the constitutionality of the statute or the right and authority of the court to consider and determine the guilt or innocence of the accused, and *for that purpose to weigh and determine the effect of the testimony offered.*" (Emphasis added.)

Insofar as petitioner's motion is grounded on a claim that he was placed in double joepardy in that the trial judge on the contempt charge increased his sentence on a prior conviction after he had commenced service of that sentence, petitioner's right to relief under Section 2255 needs no argument. *Ex parte Lange*, 18 Wall. 163.

Under the circumstances of this case, Section 2255 should not be so narrowly construed as to preclude this Court's consideration of the merits of the contentions on which petitioner's motion is grounded. We urge that these contentions are properly raised on a proceeding under Section 2255.

CONCLUSION

It is respectfully submitted that the various questions raised are of such importance in the administration of the criminal law and particularly of the law relating to the criminal contempt power of the courts and of the remedy under Section 2255 that there should be an authoritative determination of the same by this Court. Accordingly, petitioner asks that this Court issue a writ to review the judgment of the court below.

Respectfully submitted,

MARY M. KAUFMAN
Counsel for Petitioner.

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 126—October Term, 1958

(Argued November 5, 6, 1958 Decided December 2, 1958)

Docket No. 25245

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT G. THOMPSON,

Appellant.

Before:

CLARK, *Chief Judge*,
WATERMAN, *Circuit Judge*, and GALSTON, *District Judge*.

Appeal from the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*.

Robert G. Thompson appeals from the denial of his motion under 28 U. S. C. § 2255 and F. R. Crim. P., Rule 35, to vacate and set aside his sentence of imprisonment for criminal contempt. Affirmed.

MARY M. KAUFMAN, New York City, for appellant.

JOSEPH P. ALTIER, Asst. U. S. Atty., S. D. N. Y., New York City (ARTHUR H. CHRISTY, U. S. Atty., and MARK F. HUGHES, JR., Asst. U. S. Atty., New York City, on the brief), for appellee.

CLARK, *Chief Judge*:

Appellant is one of the four defendants who fled from the jurisdiction upon the affirmance in *Dennis* v. *United States*, 341 U. S. 494, of their convictions for conspiracy to violate the Smith Act. The first of these defendants to be apprehended was Hall, who was seized in Texas in a few months and found guilty by Judge Ryan of a criminal contempt, *United States* v. *Hall*, D. C. S. D. N. Y., 101 F. Supp. 666, which we affirmed, 2 Cir., 196 F. 2d 726, and the Supreme Court denied certiorari, 345 U. S. 905. Next this appellant was seized in California some 27 months later; he was found guilty of criminal contempt and sentenced to 4 years' imprisonment by Judge Noonan, *United States* v. *Thompson*, D. C. S. D. N. Y., 117 F. Supp. 685; we affirmed, 2 Cir., 214 F. 2d 545, and the Supreme Court denied certiorari, 348 U. S. 841. Thereafter and nearly 5 years after their escape, Green and Winston surrendered, notifying the press in advance of their intent to do so. They, too, were found guilty of criminal contempt. See *United States* v. *Green*, D. C. S. D. N. Y., 140 F. Supp. 117, per Dawson, *J*. We affirmed, 2 Cir., 241 F. 2d 631, and, certiorari having been granted, *Green* v. *United States*, 353 U. S. 972, the Supreme Court in turn affirmed, but by a sharply divided court, 356 U. S. 165. The present motion to vacate the conviction or correct the sentence under 28 U. S. C. § 2255 and F. R. Crim. P.

Rule 35, admittedly presents no new issues, but asks us to re-examine the record in the light of the several opinions, including the two sharp dissents for four members of the Supreme Court, in the *Green* case. Judge Palmieri has denied the application.

At the outset the United States vigorously challenges the right of the defendant to obtain a review in this proceeding of matters fully considered and adjudicated on the previous appeal. The extent of review available on this motion—the modern equivalent of a writ of error *coram nobis*—has not been explicitly stated by the Supreme Court, although it seems clear that the motion is broadly available to correct an injustice in a conviction or sentence. Thus had the Court in the *Green* case adopted the view of its minority that a judge lacks power to inflict punishment for criminal contempt by way of summary proceeding and that the defendants were entitled to be tried by a jury after indictment by a grand jury, we should not doubt both our power and our duty to apply that principle to Thompson's case now. The Court, however, affirmed, and thus this appeal can do no more than retest the evidence upon which Judge Noonan acted in holding Thompson to have had knowledge of the district court order he disobeyed by flight. It does seem to us that such re-review of the evidence is not a right to be accorded in this proceeding and that it can produce only confusion and discrimination among defendants if execution of a judicial mandate is thus to be delayed in the hope of inducing some judicial vacillation. See, e.g., cases such as *McGuinn* v. *United States*, D. C. Cir., 239 F. 2d 449, certiorari denied 353 U. S. 942; *Herman* v. *United States*, 4 Cir., 227 F. 2d 332; *United States* v. *Rosenberg*, 2 Cir., 200 F. 2d 666, 668, certiorari denied *Rosenberg* v. *United States*, 345 U. S. 965; *United States* v. *Walker*, 2 Cir., 197 F. 2d 287, certiorari denied *Walker* v. *United States*, 344 U. S. 877. Here the other fugitives have served

or are serving their sentences. So the defendant, who has been on bail, granted to await the outcome of the *Green* and *Winston* cases after serving a part of his sentence, and whose conduct appears more continuously contumacious than that of the others, might well receive an unfair reward for his persistence.

Nevertheless we have chosen to re-examine the record because the opinions in the *Green* case do prompt to careful study and because we wish to satisfy ourselves, since the earlier affirmance was by a different panel of this court. And upon such examination we are clear that Judge Noonan's findings find support in the actual testimony before him and the reasonable and rational inferences which he as a trier of facts properly drew from the evidence. The main issue of course is whether Thompson knew in fleeing from the jurisdiction that the proposed surrender order of July 2, 1951, had actually been entered. This is not a matter of *constructive notice*, as has at times been said; whatever notice should have been given Thompson was supplied by the marshal, who went to his home to serve the warrant of arrest on the afternoon of July 2 and found him missing. It is thus a question of actual knowledge of the order's entry proven circumstantially.

We shall not detail all the evidence which Judge Noonan has carefully summarized in his opinion, D. C. S. D. N. Y., 117 F. Supp. 685. Thompson's original bail bond in 1949 contained his explicit agreement to surrender upon affirmance; but when the affirmance came, and nine days later on June 13, 1951, Thompson left his home in Long Island City, and moved under circumstances of semiconcealment (using his name, but with a garbled address) into a mid-Manhattan hotel. Here he stayed until sometime on Sunday, July 1, 1951, being seen there that day, though he did not sleep there that night, leaving without paying his hotel bills and abandoning his personal belongings, including suits and a

toothbrush. Unlike the other fleeing defendants, however, he is shown to have remained in or around New York City for a time as we shall develop below. Meanwhile the Government served upon his counsel on June 28 an order on mandate in complete form, with direction to surrender to the United States Marshal on Monday, July 2, together with notice of its proposed settlement before the court. His counsel appeared in court on June 29 and tried unsuccessfully to have the surrender postponed until after July Fourth. Judge Noonan's analysis of the evidence concluding that Thompson was notified of the proposed surrender order even before the court hearing on June 29, 117 F. Supp. 685, at 686-687, 689-690, represents entirely reasonable deductions which we accept. Armed with this knowledge Thompson then went into complete concealment until he was apprehended.

Thompson's apprehension on August 27, 1953, came in a secluded and remote cabin at the end of a dead-end trail located in an isolated area of the Sierra Mountains of California. He had completely disguised his appearance and he continued to deny his identity until after his fingerprints had shown who he was. From various papers found upon him it appeared that he had assumed the character of one John Ffancis Brennan, then deceased; and the Government, aided by them and the leads they gave, has been able to construct much of his journey west and his progress in disguise. Thus we know that he remained in and about New York for about a month after his formal disappearance. In Brennan's name he applied for a New York Motor Vehicle operator's license at the Nassau office of the Commissioner of Motor Vehicles. He took a driving test on July 31 before an examiner, which he passed, receiving his license on August 1, 1951. The papers show no substantial disguise at this point. On August 29, 1951, he was obtaining membership in a union in Trenton, New Jersey. On

October 11 he obtained a Pennsylvania operator's license in Philadelphia; and from here his appearance began to, and did, change markedly. In April 1952 he obtained a temporary license in Chicago; in May 1953 a Missouri fishing permit in St. Louis; and in August 1953 a Montana fishing license in Bigfork, Montana. All of these were in the name of Brennan.

This recital presents significant facts. Thus unlike the other fugitives he is shown to have remained in the jurisdiction, albeit in substantial concealment, until well past the date of entry of the surrender order. That order and its violation was a matter of wide public interest and notoriety, being front-page news for the daily papers, so that Thompson could hardly avoid knowledge if he so desired. But in due course he felt a compulsion for flight under circumstances of the utmost concealment Since he had stayed on past the time of surrender, the inference of fact seems justified that his situation was becoming sufficiently precarious to lead him to seek greater concealment at a distance. Unless he realized that the order of surrender named him, his natural course was to continue to remain in New York to await developments. There was no countervailing evidence of any kind to cast doubt upon the inferences the court drew. We think they were rational and reasonable.

Certain grounds of differentiation from the *Green* case are urged because there the majority referred to certain admissions made by Green and Winston in announcing their intended surrender, thus recognizing that they were fugitives from justice, that they must enter prison to serve their sentences, and that they were to surrender at the Marshal's office. But if absolute proof is to be required, and the normal processes of inference rejected, all this proves no more than knowledge of the intended course of judicial action, not that it had necessarily been carried out. Thus the proof seems to us no stronger than here, and probably

not as strong, since Green and Winston had apparently fled the jurisdiction before the order was entered. As the dissenting justice says: "The petitioners had absconded by July 2, and the record is completely silent as to their whereabouts from June 29 until they surrendered almost five years later." *Green* v. *United States*, 356 U. S. 165, 221. The *Green* holding, therefore, is itself one which upholds the drawing of rational inferences.

We have often upheld the drawing of such inferences as a necessary part of the judicial process in criminal cases, as well as civil. See, e.g., *United States* v. *Masiello*, 2 Cir., 235 F. 2d 279, 284, 285, certiorari denied *Stickel* v. *United States*, 352 U. S. 882; *United States* v. *Moia*, 2 Cir., 251 F. 2d 255, 258; *United States* v. *Hines*, 2 Cir., 256 F. 2d 561, 564; *Holland* v. *United States*, 348 U. S. 121, 139, 140. It is hard to see how the process of fact finding can go on unless the trier may make the deductions which experience teaches are reasonable and justified. And the process does not differ in criminal and in civil cases, except that the over-all burden of proof to convince is stated in terms of greater admonition in the former than the latter. But what flight and disguise tell under circumstances suggesting a natural compulsion thereto is not to be rejected in a criminal case any more than in a civil case. One cannot doubt the serious question of public policy raised by the use of summary proceedings under the circumstances. A change in the now announced law to require indictment and jury trial may well be socially desirable, as suggested in, e.g., 72 Harv. L. Rev. 153-155, though it is to be noted that the statute making bail jumping a crime, passed by Congress as a direct response to these flights, 18 U. S. C. § 3146, expressly preserves the contempt power. But in any event we should not contest the policy approved by the Supreme Court's majority through the guise of making the course of judicial proof unrealistic and incapable of operation. Here it is

obvious that there can almost never be direct proof of a fugitive's knowledge of the final entry of a surrender order against him. He has fled and that is all we are likely to know when he actually gets away. Indeed if the public authorities knew more they would quickly apprehend him. It is true that public policy is often enforced through the guise of procedure, but a use of procedure to run counter to policy is both confusing and discriminatory. At any rate for us as an intermediate court we must accept the announced policy and review the evidence by normal standards.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of December one thousand nine hundred and fifty-eight.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. STERRY R. WATERMAN,
Circuit Judge,
HON. CLARENCE G. GALSTON,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT G. THOMPSON,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.